A Plain English Primer on the Washington State Blanket Primary

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1. What is the Blanket Primary?

In 1935, the Legislature approved a Grange-sponsored blanket primary initiative (Initiative 2). This primary system contains two features that have been very popular with Washington voters over the past 65 years.

First, under our historic primary system, voters are free to "cross-over" and vote for the best candidate regardless of the candidate's party affiliation.

Second, with a blanket primary, voters do not have to disclose their political party preference by picking one party's ballot over another's. Voters do not register by party. Parties and candidates have access to a list of voters, which discloses only their addresses and voting frequency but does not disclose each voter's partisan preference.

For many years, Washington was the only state with this unique nominating system for partisan offices. More recently, the blanket primary has been used in Alaska and, in a modified form, in Louisiana. In March 1996, the voters in California adopted an initiative – Proposition 198 – that replaced the closed primary nominating system in that state with a blanket primary.

An extensive history of our state's primary system is contained in Appendix A.

2. What is the legal history of the Blanket Primary?

Legal Challenge in California. The California Republican and Democratic parties, together with two minor political parties, challenged the new blanket primary law in Federal District Court (California Democratic Party et al. v. Jones, et al.). The case is nicknamed "Cal-Demo" for short. The plaintiffs alleged that the blanket primary interfered with and injured the political parties' rights of association, which are protected under the First Amendment of the U. S. Constitution. A trial was conducted by the District Court to determine whether the parties were actually injured by the blanket primary and whether or not this nominating system burdened the interests of the parties to an extent that affected their constitutional rights.

The District Court found that the impact of the blanket primary on the political parties was incidental and that, accordingly, the statute was not in conflict with the political parties' constitutional right of association. The Ninth Circuit Court of Appeals affirmed the District Court decision. The political parties appealed this ruling to the U. S. Supreme Court.

Ruling by the U. S. Supreme Court. The case was argued before the Supreme Court on April 24, 2000. On June 26, 2000, The Supreme Court overturned the lower court decision and ruled that the blanket primary law in California violates a political party's First Amendment right of association. See Appendix B for the entire decision.

Lawsuit by Washington's Major Political Parties. On July 20, 2000, the Washington Democratic Party filed suit against the State of Washington in the Federal District Court in Tacoma. The lawsuit challenged the constitutionality of the Blanket Primary system citing the U.S. Supreme Court decision in the *Cal-Demo* case. The case is cited as Washington State Democratic Party v. Reed, 343 F.3d 1198 (9th Cir. 2003). On the same date that the complaint was filed (July 20, 2000), the Republican Party joined the case as an intervener and on February 12, 2001, the Libertarian Party intervened. The Washington Grange intervened on February 16, 2001.

The lawsuit was only filed after the parties on both sides agreed to the language of an interim order that allowed the September 2000 Primary Election to proceed under our traditional Blanket Primary system. The major political parties indicated that they expected Washington State to alter its primary system for the 2001 Primary Election to conform to the U.S. Supreme Court decision and would not support further delays.

3. What is the current legal situation of the Blanket Primary?

In 2002, U.S. District Court Judge Franklin Burgess ruled to dissolve the injunction against Washington State's blanket primary. The political parties immediately appealed this decision to the 9th Circuit Court of Appeals. On September 15, 2003, a three judge panel of the 9th Circuit Court of Appeals handed down their decision to "reverse and remand" Judge Burgess' ruling in favor of the political parties.

In summary, the 9th Circuit's ruling states that Washington's blanket primary, on its face, is a violation of the political party's First Amendment right of association. Judge Kleinfeld, writing for the 9th Circuit panel closely modeled his opinion to the legal reasoning in *Cal-Demo*.

It is crucial to note that this decision addresses the constitutionality of a blanket primary system, and only a blanket primary system. It does not make any constitutional judgment regarding any other primary system nor does it give any direction on which type of primary to adopt. For these reasons a list of options to Washington's blanket primary are provided in Section 5 of this primer.

The Secretary of State, Attorney General and the Grange have filed an *en Banc* appeal to the entire 9th Circuit which was denied in late October 2003. At the time of this document's printing, our offices are preparing a petition for certiorari to the United States Supreme Court which will be filed approximately by the beginning of December, 2003.

4. Why should the Legislature act now on this issue?

As it stands right now, Washington State has no primary system in place for 2004. There are three reasons for this: 1) the 9th Circuit has barred us from holding a blanket primary, 2) the courts have given no mandate as to which type of primary we must hold and 3) there is no other partisan primary system in the Revised Code of Washington to guide us.

To allow even a remote chance that we would proceed into the 2004 election cycle without a primary is not an option. One only has to consider the current chaos in the California recall election with over 100 candidates on the ballot vying to replace Governor Gray Davis. The idea that anyone might be elected to office with such a small plurality of votes is not something we should entertain in Washington State.

Therefore, I am strongly advocating the Legislature take action in the 2004 Legislative Session to secure a primary system in order to maintain the security and integrity we have become so proud of.

It behooves all of us entrusted to hold public office to work for a responsible primary plan that the voters will find simple to use and which reflects their wishes.

5. What are the options to replace the Blanket Primary?

In the closing weeks of the 57th Legislature (2001), it became apparent that there is a limited set of options for redrafting our state's primary system. Some options are "illusory" because the two major parties have made it very clear that they will not consent to any Blanket Primary ballot that permits crossover voting. All options, realistic or not, can be outlined in a short list:

Option A – Modified Blanket Primary – "Top Two" System

Candidates file and state their "opinion" as to their party preference. Candidate's name and party preference appear on primary ballot. Top two candidates, regardless of their party preference, proceed to General Election. This is the system Washington State now uses in the odd-years for local elections. The parties play the same role in this primary process that they do in our current blanket primary.

Option B – Washington Presidential Primary Model
Choice of unaffiliated or individual party ballots. Unaffiliated ballots will not count unless each political party consents, and both major political parties have indicated they will not count these ballots. Even If the parties are given a list of who picked which type of ballot, voters could still maintain their privacy by selecting the unaffiliated option. This option is similar to Washington's current Presidential Primary system, which has been criticized by voters and editorial writers for its complex and confusing attributes of what does and does not count. Because the unaffiliated option is illusory, this plan produces a result that would be similar to the political parties winning the current litigation.

Option C – **Open Primary –** Voters have a choice of one party's ballot only and crossover voting is eliminated. This system can be crafted with or without disclosure of each voter's party preference. Privacy can be maintained.

Option D – **Closed Primary –** Voters register by party, vote that party's primary ballot, with public disclosure of each voter's party preference. The political parties must consent to allowing Independents to vote in their respective primaries. Both major political parties have hinted that they may permit Independent voters to vote in their respective primary.

Option E – **Non-Partisan Offices and Non-Partisan Primary.** This is similar to Nebraska's system where their unicameral legislature is non-partisan, and to Washington's odd-year election system for non-partisan local officials. It eliminates party labels as an information source for voters, and it would make it difficult to organize legislative caucuses.

Option F – **Party Nominating Conventions.** Under this system, each party would be responsible for picking a nominee for each office that would appear on the General Election ballot. Parties would devise their own rules to govern their own selection process that typically uses conventions.

A more detailed discussion of the alternatives to the Blanket Primary is contained in Appendix E.

6. What does the public think about replacing the Blanket Primary?

The Secretary of State conducted nine public hearings across the state between September 21 and September 29, 2000. Hearings were held in Vancouver, Aberdeen, Yakima, Richland, Ephrata, Spokane, Bellingham, Bellevue, and Olympia. Two additional hearings were held on November 14, one in Tacoma and the other in Seattle.

The findings from these public hearings were crystal clear: Washington State voters want to retain the Blanket Primary, and if they cannot, then they want a new primary system which retains important attributes such as cross-over voting and the right of privacy in terms of not disclosing a party preference.

The March 2001 the Elway Poll confirmed these findings. In that survey, 75 percent of those questioned said they did not want to be limited to voting for candidates of one political party. Eighty-two percent said they were adamantly opposed to any disclosure of their political party preference.

7. What does Secretary of State Reed recommend? And why?

Of the options presented in Section 4 of this primer, I believe the best alternative for our state is a modified blanket primary system for the following simple reasons:

1. It is the closest system to our current blanket primary;
2. It is modeled after our system to elect over 5,000 non-partisan officials in our odd-year primaries;
3. The primary ballot will look the same to the voters;
4. Because of the same ballot structure, there will be no additional administrative cost to the counties;
5. It requires no party registration and preserves the voters' secrecy of the ballot;
6. Both *Cal-Demo* and the recent 9th Circuit decision indicate that a "top two" primary would pass constitutional muster.
7. It clearly preserves the criteria (no registration, privacy and a free choice of candidates) the voters of our state have overwhelmingly cherished.

The Modified Blanket Primary most closely resembles our current Blanket Primary. In most years and in most elections, voters and candidates would not notice any change. On rare occasions, the top-two vote getters that go on to the General Election may be from the same party. In 1998 and 2000, no Congressional or statewide race, only one state Senate race and a half dozen state House races would have had two people from the same party in the General Election.

It's worth noting that the major parties have voiced strong objection to this option. Indeed, there is a chance they may file another suit over this type of primary as well. They believe it to be too "unusual" and that it doesn't go far enough to satisfy *Cal-Demo*. While I understand their views, I respectfully disagree with them. [See Section 8 of this primer.]

In the 2001 legislative session, a primary patterned after our state's Presidential Primary was an option which gained some attention. To review, this system would require separate major party ballots as well as an "unaffiliated" ballot representing all of the candidates regardless of political party. This would be a viable option if, and only if, the major political parties consented to counting these votes cast on the "unaffiliated" ballots. Both parties have indicated to our office that they will not consent to the unaffiliated ballot being among the mix of ballots that will actually count.

This means the "traditional" option is illusory since the state cannot force the major parties to accept it and the parties have already rebuffed it. Without a meaningful unaffiliated option, adopting this proposal is tantamount to adopting a closed primary. The voters of this state deserve a better outcome than a new primary system that contains a "false promise" of an option that will not be used.

If the legislature or the court does not see fit to adopt a Modified Blanket Primary, the next-best option is an Open Primary that gives voters a choice of party ballots from which they must pick only one. In essence, we give up crossover voting to protect our privacy in the voting booth. It is more forthright than the Presidential Primary Model with the illusory unaffiliated option.

It would be unfortunate for our state to adopt a Closed Primary system or to eliminate partisan races (non-partisan), or to select party nominees by party convention. Political parties perform a valuable role in democratic republics and should be part of the system. However, they should not dominate our electoral system by selecting nominees through conventions – a historic "smoke-filled room" practice now abandoned in all 50 states.

8. Is a Modified Blanket -"Top Two" - primary modeled after our Non-partisan Primaries legally defensible?

Any system for conducting primary elections, other than one that simply grants the political parties all of their wishes, seems likely to be subject to further litigation. How that litigation comes out may depend on a number of factors, including the way that legislation would address the numerous details that affect how a primary is conducted. However, both the U.S. Supreme Court and the Ninth Circuit have included passages in the opinions that support the concept that embodies the Washington Primary. The U.S. Supreme Court stated in California Democratic Party et al. v. Jones, et al, 530 U.S. 585-86 (2000):

> Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: **Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy", and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.** [Emphasis added)

Even while rejecting Washington's traditional form of the blanket primary, the Ninth Circuit reiterated in Democratic Party v. Reed, 434 F.3d at 1203, that the Supreme Court has "also distinguish[ed] the 'nonpartisan blanket primary' in which voters can voter for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election."